

Can Mediation Be the Answer to Taxpayers' Woes?: An Examination of the Internal Revenue Service's Mediation Program

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I. INTRODUCTION

Taxes are at the heart of any government system; no government can operate without taxes.¹ Therefore, vast importance is placed on the efficient operation of the tax system. In response to increased litigation costs and "generally unsatisfactory results," the Internal Revenue Service (IRS) began to implement alternative dispute resolution (ADR) techniques.² The IRS recently focused on mediation, "a process by which a neutral third party, the mediator, assists disputing parties in reaching a mutually satisfactory resolution."³ If used appropriately, mediation can save time and money.⁴

The IRS hopes that the use of mediation will improve the taxpayer's view of the tax collection system, thereby making taxpayers more willing to participate in paying taxes.⁵ It has been argued that the success of the tax system primarily depends on an effective grievance handling system; this system, in turn, will have the effect of voluntary compliance by taxpayers.⁶ This Note will argue that mediation is one such "effective grievance handling system." In fact, Vincent Canciello, IRS National Director of Appeals, argued that the provision of ADR as an alternative to litigation is "an integral component of voluntary

¹ One commentator suggested that, "[t]he tax system and the IRS are a part of this nation's infrastructure, just like the highways and airports." *IRS Restructuring: Hearings on H.R. 2676 Before the Senate Comm. on Fin.*, 105th Cong. 307, 309 (1998) [hereinafter *IRS Restructuring*] (statement of Michael E. Mares, Chair, Tax Executive Comm., AICPA).

² Steven C. Wrappe, *The IRS Expands Use of Alternative Dispute Resolution*, 95 TAX NOTES TODAY 91-86, May 10, 1995, available in WESTLAW, 95 TNT 91-86. ADR is any process "designed to settle a dispute without litigation." Vincent S. Canciello, *How to Handle Tax Controversy at the IRS and in Court After the IRS Restructuring and Reform Act of 1998*, in APPEALS DISPUTE RESOLUTION PROGRAMS, at 5, 12 (ALI-ABA Course of Study Materials Dec. 10, 1998).

³ KIMBERLEE K. KOVACH, *MEDIATION: PRINCIPLES AND PRACTICE* 16 (1994).

⁴ See *id.* at 40; Canciello, *supra* note 2, at 7 (arguing that the use of ADR by the Treasury Department results in "substantial" cost savings to taxpayers and the government).

⁵ See Kirsten J. McDonough, *Resolving Federal Tax Disputes Through ADR*, ARB. J., June 1993, at 38, 40.

⁶ See Amy Hamilton, *Wetzler's Gone but Not Forgotten*, TAX PRAC., July 5, 1999, at 12, 12.

compliance.”⁷ However, due to the success of the long-standing Appeals Office of the IRS in resolving taxpayer disputes, the IRS has been hesitant to implement a full-blown mediation program.⁸

This Note will provide a critical overview of the present IRS mediation program, examine the benefits brought to the IRS and taxpayers by the program, and suggest areas that the IRS may want to examine to increase the program’s success potential. Specifically, Parts II and III of this Note will examine the development of mediation in the IRS and provide a brief description of its present mediation pilot program. Finally, Part IV compares other state governments’ and federal agencies’ mediation procedures with the IRS program and suggests areas that the IRS may examine in order to increase the effectiveness of its program.⁹

II. IRS STRUCTURE FOR MEDIATION

This Part provides a basic overview of the structure of the IRS and how mediation is integrated. In addition, this Part discusses why the IRS chose to implement mediation and its timetable for the pilot programs.

A. Basic Structure

The IRS’s structure accommodates the use of mediation to resolve taxpayer disputes. The IRS’s mission is “to collect the proper amount of tax revenue at the least cost to the public, and in a manner that warrants the highest degree of public confidence in the Service’s integrity, efficiency, and fairness.”¹⁰ The IRS accomplishes its mission through its three organizational levels, as follows: the national office, four regional offices, and thirty-three district offices and service centers throughout the country.¹¹ The IRS process begins when a taxpayer voluntarily files a tax return.¹² If the IRS disputes what the taxpayer has filed, such disputes are resolved either through its Appeals Office (sometimes referred

⁷ Canciello, *supra* note 2, at 7.

⁸ See *infra* Part II.A.

⁹ This Note does not purport to provide the only alternatives available for strengthening the IRS mediation program, but rather it suggests areas upon which the IRS could focus when examining ways to improve this program.

¹⁰ NAT’L ARCHIVES & RECORDS ADMIN., UNITED STATES GOVERNMENT MANUAL 458 (1997–1998).

¹¹ See *id.* at 459. The IRS processes over 200 million tax returns each year, collecting over \$1.5 trillion in tax revenue. See *IRS Restructuring*, *supra* note 1, at 354, 359 (statement of Hon. Charles O. Rossotti, Comm’r of IRS).

¹² See McDonough, *supra* note 5, at 38.

THE INTERNAL REVENUE SERVICE'S MEDIATION PROGRAM

to hereinafter as the "Office"), its Examination Division, or its Office of Chief Counsel.¹³ The use of mediation is placed exclusively in the Appeals Office, in which taxpayer disputes are resolved without the use of litigation.¹⁴

The Appeals Office, founded in 1927, is boasted to be "one of the oldest and largest dispute resolution organizations in the United States."¹⁵ The Office is viewed as an alternative to litigation in the federal district courts or U.S. Tax Court. Its mission is to "enhance voluntary compliance and public confidence in the IRS"[sic] integrity and efficiency" when dealing with taxpayer disputes over tax liability.¹⁶ It is within the Office that mediation may be requested after the Examination Division informs the taxpayer of a tax dispute.¹⁷ By using mediation before the taxpayer has the opportunity to file with a court, the IRS avoids the litigation (and the costs) that may ensue.¹⁸

However, the Appeals Office has been slow to implement mediation because of the Office's success in resolving taxpayer disputes through its established procedures.¹⁹ For example, in 1995 the Office resolved more than eighty-five

¹³ See GEN. ACCOUNTING OFFICE, REPORT NO. GGD-97-71, INTERNAL REVENUE SERVICE: IRS INITIATIVES TO RESOLVE DISPUTES OF TAX LIABILITIES 2 (1997). The taxpayer is first notified of a dispute when the Examination Division issues a "30-day letter" to the taxpayer. See McDonough, *supra* note 5, at 38-39. Basically, this letter is a bill with an explanation, giving the taxpayer 30 days to respond. See *id.* At this point, the taxpayer may appeal this letter to the Appeals Office. See *id.* If the taxpayer decides not to appeal or respond to this letter, the IRS will issue a "90-day letter," also referred to as a "Notice of Deficiency," and the taxpayer's file then is assigned to the federal district court for trial. At this point, the taxpayer has three options. First, the taxpayer can decide to pay the alleged deficiency and then file for a refund in the United States Court of Federal Claims. See *id.* at 39-40. Another option, which most taxpayers pursue, is to file with the U.S. Tax Court for relief. By filing with the Tax Court, the taxpayer does not need to pay the alleged deficiency until it is ruled upon. See *id.* The final option is to do nothing. However, if the taxpayer does not respond in 90 days, the IRS can levy an assessment on the taxpayer's property. See *id.*

¹⁴ See GEN. ACCOUNTING OFFICE, *supra* note 13, at 2; James A. Dougherty, *Mediation*, 30 TAX ADVISER 267, 267 (1999).

¹⁵ GEN. ACCOUNTING OFFICE, *supra* note 13, at 2. The Appeals Office is comprised of more than 2,100 employees. See *id.* The Office is part of the Office of the Commissioner of the IRS. See Canciello, *supra* note 2, at 7.

¹⁶ GEN. ACCOUNTING OFFICE, *supra* note 13, at 2.

¹⁷ See *id.* Issues brought to the Appeals Office include the time at which adjustments or penalties are imposed, refunds or credits are disallowed, and enforcement action has been taken by the IRS. See Canciello, *supra* note 2, at 8.

¹⁸ See GEN. ACCOUNTING OFFICE, *supra* note 13, at 2.

¹⁹ See Tonya M. Scherer, Comment, *Alternative Dispute Resolution in the Federal Tax Arena: The Internal Revenue Service Opens Its Doors to Mediation*, 1997 J. DISP. RESOL. 215, 219 (1997). Scherer provides an excellent overview of the introduction of mediation to the IRS's resolution of tax disputes. See generally *id.*

percent of cases without the use of mediation.²⁰ Its success is due to its ability to settle a dispute more easily than other divisions because, unlike the Examination Division, which is limited to the tax code in its decisions, the Appeals Office is authorized also to consider the avoidance of litigation as a factor in settling a dispute.²¹ The IRS is hesitant to jeopardize this success and cautions that the introduction of mediation may burden the workload of the Appeals Office.²² As a result, a taxpayer may request mediation only when the taxpayer has failed to settle under the established appeals procedures.²³

Overall, the structure of the IRS invites the use of mediation because of its Appeals Office's purpose of resolving cases without the use of litigation. Given the Office's success, however, it may take longer to sway IRS officials that mediation has the potential to be similarly, if not more, successful once it is fully implemented.

B. *Introduction of Mediation to the IRS*

The IRS has been hesitant to implement any traditional ADR techniques because of the success of the Appeals Office in settling taxpayer disputes.²⁴ If any ADR techniques are implemented, they therefore tend to be drawn narrowly.²⁵ However, in response to the Administrative Dispute Resolution Act²⁶ (ADRA) in 1990, the IRS implemented procedures, including the use of mediation, to satisfy the duties set forth in the ADRA for the increased use of ADR.²⁷ Congress enacted the ADRA to encourage federal agencies to "reap the benefits of ADR processes."²⁸ In fact, the ADRA requires all federal agencies

²⁰ See Thomas Carter Louthan & Steven C. Wrappe, *Building a Better Resolution: Adapting IRS Procedures to Fit the Dispute*, 96 TAX NOTES TODAY 224-69, Nov. 18, 1996, available in WESTLAW, 96 TNT 224-69, ¶¶ 1-3 (stating that approximately 65,000 cases were closed in 1995).

²¹ See GEN. ACCOUNTING OFFICE, *supra* note 13, at 2.

²² See Benson Goldstein, *IRS Official Claims Reform Bill May Complicate Appeals*, NAT'L PUB. ACCT., Oct. 1998, at 10, 10 (commenting on a statement by Vincent Canciello, IRS National Director of Appeals, concerning the increased use of mediation proposed by the IRS Restructuring and Reform Act of 1998, 26 U.S.C.A. §§ 1 *et seq.* (West 1988 & Supp. 1999)).

²³ See Scherer, *supra* note 19, at 219.

²⁴ See *id.* at 215.

²⁵ See Louthan & Wrappe, *supra* note 20, ¶ 6.

²⁶ 5 U.S.C. §§ 556-593 (1994), amended by Administrative Dispute Resolution Act of 1996, 5 U.S.C. §§ 571-584 (Supp. IV 1998).

²⁷ See *id.*

²⁸ Robin J. Evans, Note, *The Administrative Dispute Resolution Act of 1996: Improving Federal Agency Use of Alternative Dispute Resolution Processes*, 50 ADMIN. L. REV. 217,

to implement ADR procedures.²⁹ As a result, the IRS introduced "dispute resolution initiatives," including the introduction of mediation, in order to reach its goals of reducing "the overall time, costs, and taxpayer burden of dispute resolution."³⁰

In response to the ADRA, on October 30, 1995, the IRS initiated its first one-year test of mediation.³¹ The IRS renewed this test for an additional year on January 13, 1997 to evaluate the program further and recently renewed it again for another two years beginning on November 16, 1998.³² However, due to the success of the Appeals Office, mediation may be used only after negotiations with the Appeals Office have failed.³³ But, with each new test period, the IRS provides taxpayers with increased opportunities to use mediation to resolve their disputes by further developing the program.³⁴

233 (1998).

²⁹ See *id.* at 218–19 (citing 5 U.S.C. §§ 571–583). The ADRA requires that each agency appoint a "Dispute Resolution Specialist" to facilitate and implement ADR policy. See 5 U.S.C. § 571 note (1994) (Promotion of Alternative Means of Dispute Resolution), amended by 5 U.S.C. § 571 note (Supp. III 1997). President Clinton reauthorized the ADRA on October 19, 1996. See Eric Lawson, Jr., *Alternative Dispute Resolution*, 69 N.Y. St. B.J., Dec. 1997, at 18, 18; see also 5 U.S.C. §§ 571–584 (Supp. III 1997). This version improved upon the 1990 ADRA by eliminating an escape clause by which agency heads could void arbitral awards and by ensuring confidentiality of a mediator's documents, communications with parties, and settlements proposals. See Evans, *supra* note 28, at 228–31. This confidentiality provision is essential to promoting the effectiveness of mediation for resolving settlements. Confidentiality encourages a full discussion, because "without the protection of confidentiality, parties would be unwilling to communicate freely, and the discussion necessary to resolve disputes would be seriously curtailed." GA. Ct. R.P. app. C (ADR).

³⁰ GEN. ACCOUNTING OFFICE, *supra* note 13, at 3. Other initiatives introduced include the following: voluntary binding arbitration under TAX CT. R. 124; the creation of an "TRS Taxpayer Advocate" position with authority to require or stop an action with regard to a taxpayer; implementation of Competent Authority Assistance Procedures for disputes between the United States and treaty nations or between taxpayers and the Appeals Office; a change in the tax treatment of environmental clean-up costs; and commencement of the Classification Settlement Program (CSP) to resolve disputes over the classification of workers. See *id.* at 26–27.

³¹ See *Test of Mediation Procedure for Appeals*, I.R.S. Notice 95-86, 1995-44 C.B. 27.

³² See *Extension of Test of Mediation Procedure for Appeals*, I.R.S. Announcement 97-1, 1997-2 I.R.B. 62; *Test of Mediation Procedure for Appeals*, I.R.S. Announcement 98-99, 1998-46 I.R.B. 34.

³³ See Louthan & Wrappe, *supra* note 20, ¶ 37.

³⁴ See *infra* Part III.B.

The IRS Restructuring and Reform Act of 1998³⁵ ("the Act") is another impetus causing the IRS to increase its use of mediation to resolve taxpayer disputes.³⁶ The Act has generated criticism and praise with its mission: to create a "kinder, gentler IRS."³⁷ Charles O. Rossotti, Commissioner of the IRS, explained that the Act's purpose is to shift the focus of the agency's internal operations by becoming a customer-oriented agency, looking at its operations from the taxpayer's point of view.³⁸ With regard to mediation, the Act proposes that the IRS must establish procedures for taxpayers and the Appeals Office to request mediation on any unresolved issue at the Appeals Office.³⁹ However, the Act is yet to be implemented fully; therefore, mediation requests are still granted on an ad hoc basis.⁴⁰ Although the restrictions still exist on who can access mediation procedures, at least it is now almost certain that most of these limitations will vanish in the near future.

III. USE OF MEDIATION BY THE IRS

This Part will provide an overview of the mediation pilot program implemented by the IRS. It begins with a brief general discussion of the mediation process and how the IRS has adopted or amended the basic structure. Each mediation pilot test is then discussed, examining developments that have emerged at each stage. This Part also will examine the benefits that mediation provides the IRS and the taxpayers when in practice.

³⁵ 26 U.S.C.A. §§ 1 *et seq.* (West 1988 & Supp. 1999).

³⁶ See 26 U.S.C.A. § 7123 (mandating the Office's use of mediation).

³⁷ Goldstein, *supra* note 22, at 10.

³⁸ See *IRS Restructuring*, *supra* note 1, at 359 (statement of Hon. Charles O. Rossotti, Comm'r of IRS). Mr. Rossotti created the Taxpayer Treatment and Service Improvements Program to plan and manage IRS changes in response to the Act. See *New Program to Improve Taxpayer Treatment and Service*, I.R.S. News Release IR-98-18 (Mar. 31, 1998). In revamping its operations, the IRS is guided by the following five principles: (1) understand and solve problems from the taxpayer's point of view; (2) expect managers to be accountable; (3) use balance measures of performance; (4) foster open and honest communications; and (5) insist on total integrity. See *A Modernized Internal Revenue Service*, I.R.S. Fact Sheet FS-98-5 (Mar. 31, 1998).

³⁹ See Barbara T. Kaplan, *Corporate Income Tax Controversies and Litigation: Can the Scales of Justice Be Tipped in the Taxpayer's Favor?*, in *TAX STRATEGIES FOR CORPORATE ACQUISITIONS, DISPOSITIONS, SPIN-OFFS, JOINT VENTURES, FINANCINGS, REORGANIZATIONS & RESTRUCTURINGS 1998*, at 961, 1023 (PLI Tax Law & Estate Planning Course Handbook Series No. J0-000C, 1998) (citing I.R.C. § 7123(f)(1) (West Supp. 1999)).

⁴⁰ See Canciello, *supra* note 2, at 15.

A. Brief Explanation of Mediation

The structure of the IRS lends itself to benefit from the use of mediation. In general, mediation is a flexible process in which the mediator's purpose is solely to facilitate settlement between parties.⁴¹ The mediator only controls the process; the parties to the dispute control the content of the mediation.⁴² Similar to this basic definition, the IRS defines mediation as the use of "a trained individual to help the parties negotiate a mutually agreeable settlement. The mediator has no independent authority and does not render a decision or opinion; a decision must be reached by the parties themselves."⁴³ One commentator has referred to this type of mediation as being "in its pure form," in which mediation is driven by the parties.⁴⁴ In addition, in its "pure form" mediation is purely voluntary, and either party has the option of stopping the mediation process at any time.⁴⁵

Mediation is often preferred over litigation because of its four main benefits, which can be described as follows: informality, flexibility, voluntary nature, and nonbinding nature. In addition, litigation tends to result in substantial costs in terms of time and money. Litigation also tends to focus on narrow issues and looks to prior decisions and predefined remedies to determine an end result.⁴⁶ Mediation, on the other hand, saves time and money for a law firm by avoiding costs for expert opinions, depositions, and discovery.⁴⁷ In addition, mediation is not limited to predefined legal remedies and prior decisions, and it can look

⁴¹ See KOVACH, *supra* note 3, at 23.

⁴² See *id.* at 29. Mediators control the process by stepping in "when one party monopolizes the discussion, when parties interrupt one another, when parties do not listen to each other." Robert R. Rigolosi, *The Art of Mediation*, REPORTER, Winter 1999, at 3, 3.

⁴³ GEN. ACCOUNTING OFFICE, *supra* note 13, at 22.

⁴⁴ See Lawson, *supra* note 29, at 18.

⁴⁵ See *id.*

⁴⁶ See Kenneth R. Feinberg, *Mediation—A Preferred Method of Dispute Resolution*, 16 PEPP. L. REV. S5, S5–S6 (1989). Feinberg expands on the benefits of mediation in his article. Feinberg explains that, because it is informal and nonbinding, mediation allows parties to have control of the process but allows them to withdraw at any time. See *id.* Therefore, mediation is a risk-free procedure, asking only that the parties "give it a try." Because it is informal, mediation is not limited to legal rules; it is limited only to those rules set by the parties. By being flexible, mediation may be used at any stage of a dispute, regardless of whether the dispute is already in litigation. In addition, mediation may be used in a variety of disputes. See *id.* at S7–S9.

⁴⁷ See Steven M. Platau, *When ADR Works for the CPA: Solve Disputes Before Costs Grow*, 186 J. ACCT. 80, 80 (1998). Additional costs that can be avoided are travel costs for witnesses, transcript fees, and even attorney fees, because attorneys are not required in mediation. See Capt. Drew Swank, *Mediation and the Equal Employment Opportunity Complaint Process*, ARMY LAW., Sept. 1998, at 46, 46.

beyond the issues to find a "true" resolution to the problem by exploring the relationship between the parties.⁴⁸ The result in mediation, unlike in litigation, is a compromise between the parties.⁴⁹ Because of these benefits, mediation is considered the preferred ADR method outside the tax arena.⁵⁰

B. *When, Who, and What Situations*

The evolution of the mediation process tailored to the resolution of taxpayer disputes may be seen from each pilot mediation program that has been implemented. At each stage, the IRS appears to be evaluating weaknesses in its program and evolving the program further. For example, the first one-year test, begun in October 30, 1995,⁵¹ applied only to cases that were assigned to Appeals Team Chiefs within the Coordinated Examination Program (CEP) after the Appeals Office's settlement discussions were unsuccessful. In addition, the cases must have been approved for mediation by the Assistant Regional Director of Appeals-Large Cases.⁵² At this stage, mediation was unavailable to cases that contained a docketed issue or an issue designated for litigation, an issue within the Industry Specialization Program (ISP) or an Appeals Coordinated Issue (ACI), or a request by the taxpayer for Competent Authority Assistance.⁵³ The

⁴⁸ See Feinberg, *supra* note 46, at S6-S7.

⁴⁹ See William A. Newman, *Use of Non-Adjudicative Third Party Dispute Resolution Methods by Dispute Resolution Agencies of the United States Government*, 17 OHIO N.U. L. REV. 121, 122-23 (1990). A compromise appears to be a more "lasting agreement" between the parties than a result determined by litigation because the parties are more likely to obey an agreement that is of their own making. See Swank, *supra* note 47, at 46.

⁵⁰ See Scherer, *supra* note 19, at 218.

⁵¹ See *Test of Mediation Procedure for Appeals*, *supra* note 31, at 27.

⁵² See *id.* at 28. CEP is an IRS program which addresses large cases (in terms of value). CEP cases include disputes involving corporations with more than \$250 million in assets or otherwise. See James E. Merritt, *Administrative Procedures: Large Case Audits; Industry Specialization Program; Coordinated Examination Program*, in *HOW TO HANDLE A TAX CONTROVERSY AT THE IRS AND IN COURT*, at 25, 27-28 (ALI-ABA Course of Study Materials Oct. 16, 1997).

⁵³ See *Test of Mediation Procedure for Appeals*, *supra* note 31, at 27. ISP's purpose is to identify industries that present issues to the IRS, assist auditing the taxpayers in those industries, and "ensure uniform and consistent treatment of issues." Merritt, *supra* note 52, at 40. Once an ACI is designated as such by the National Director of Appeals, a settlement is prohibited without the approval of the ACI coordinating official. See 13 JACOB MERTENS, JR., MERTENS LAW OF FEDERAL INCOME TAX § 49B.62 (1997). Competent Authority Assistance generally is described in U.S. tax treaties as "a means of contesting actions by one or both of the countries that may result in taxation not in accordance with the treaty." Michael G. Brandt & Mark H. French, *Revised Competent Authority Procedures Expand Availability but More Guidance Is Needed*, 83 J. TAX'N 223, 223 (1995).

THE INTERNAL REVENUE SERVICE'S MEDIATION PROGRAM

scope of the test did not expand substantially until its most recent renewal in 1998. In the 1998 test, the IRS, with the goal of including more individuals in the process, allowed any individual to use mediation if the dispute involved an adjustment of one million dollars or more and the case involved factual issues (such as valuation, reasonable compensation, or transfer pricing).⁵⁴ As a sign of the successful implementation of mediation, the pilot program tends to include more taxpayer disputes at each test level.

The present mediation test, however, does contain limitations to restrict a taxpayer's access to the mediation process. Under the present IRS mediation test, the mediation process may begin for the taxpayer only when negotiations with the Appeals Office have failed. When such failure occurs, the taxpayer may request mediation in both docketed and nondocketed cases.⁵⁵ The request must be approved by the Assistant Regional Director of Appeals-Large Cases. Approval usually is granted within thirty days of receipt of the request. If the request is not approved because the taxpayer did not meet the requirements for using mediation, the case will go back to the appeals process and then to litigation.⁵⁶ As a result, not all taxpayer disputes, even those meeting the dollar threshold, automatically may use mediation as a dispute resolution technique.

With regard to the technical process, the IRS, in certain aspects, does not appear to diverge from the norm. For example, if the parties (i.e., the IRS and the taxpayer) agree to mediate, the parties first develop a written mediation agreement. The agreement identifies the participants, the mediator(s), the party or parties paying the mediator, the issues to be mediated, the materials to be furnished to the mediator, and a proposed schedule and location for the mediation.⁵⁷ In the agreement, the taxpayer also allows the parties and the mediator access to any tax returns or information needed for the mediation, in accordance with I.R.C. § 6103, which provides the confidentiality guidelines for taxpayer returns.⁵⁸ In addition, the parties agree not to disclose voluntarily

⁵⁴ See *Extension of Test of Mediation Procedure for Appeals*, *supra* note 32, at 34.

⁵⁵ See Louthan & Wrappe, *supra* note 20, ¶ 37.

⁵⁶ See Scherer, *supra* note 19, at 220–21.

⁵⁷ See *id.* at 221. In order to facilitate the writing, the IRS provides taxpayers model agreements (e.g., agreements to mediate, participants' lists, and consents to disclosure of tax return information). See *Extension of Test of Mediation Procedure for Appeals*, *supra* note 32, at 37.

⁵⁸ See I.R.C. § 6103 (1994 & Supp. III 1997) (stating that "except as authorized by this title," "[r]eturns and return information shall be confidential"). However, I.R.C. § 6103(c) provides that:

The Secretary may . . . disclose the return of any taxpayer, or return information with respect to such taxpayer, to such person or persons as the taxpayer may designate in a request for or consent to such disclosure, or to any other person at the taxpayer's

communications made during the mediation, except pursuant to the Administrative Procedure Act of 1996, which allows disclosure only in narrow circumstances.⁵⁹ The IRS insists upon a written agreement before proceeding to the actual mediation because the parties may decide, through the negotiations for the agreement, that the parties can resolve the dispute without mediation. The agreement also provides a "reality check" for both parties in which both parties review each issue to be discussed before proceeding to mediation.⁶⁰

Also, within the mediation agreement, the parties (i.e., the taxpayer and the Assistant Regional Director of Appeals-Large Cases) identify a mediator or a procedure to select a mediator. Selecting a mediator is one of the most important decisions before mediation can begin because the mediator will be controlling the entire process.⁶¹ The Federal Mediation and Conciliation Service or the U.S. Administrative Conference can assist parties in selecting a mediator.⁶² The mediator may be a non-IRS employee, an Appeals Office representative from another office or region, or an Appeals Office representative from the National Office. If the mediator is from the Appeals Office, the National Office will cover the mediator's expenses; otherwise, the expenses are split equally between the parties.⁶³ Once selected, the mediator has no authority to impose a decision, but facilitates settlement by assisting in defining issues and promoting settlement negotiations. The mediator is also responsible for discussing the rules and procedures of the mediation process with the parties.⁶⁴ The choice of the mediator in a taxpayer dispute must, therefore, be scrutinized carefully.

request to the extent necessary to comply with a request for information or assistance made by the taxpayer to such other person.

I.R.C. § 6103(c).

⁵⁹ See Administrative Procedure Act of 1996 § 3, 5 U.S.C. § 574 (1994 & Supp. IV 1998). This section provides that such information may be disclosed if all parties consent in writing, the communication has been made public, and the court determines disclosure is necessary to prevent a manifest injustice, establish a violation of the law, or prevent harm to the public. See *id.* § 574(a). The party must determine if the disclosure is "of sufficient magnitude . . . to outweigh the integrity of dispute resolution proceedings in general by reducing the confidence of parties in future cases that their communications will remain confidential." *Id.* § 574(b).

⁶⁰ See Louthan & Wrappe, *supra* note 20, ¶ 41.

⁶¹ See Rigolosi, *supra* note 42, at 3; see also *supra* note 42 and accompanying text.

⁶² See Lee G. Knight & Ray A. Knight, *Dispute Resolution with the IRS and Taxpayer Bill of Rights 2*, 13 AKRON TAX J. 27, 49 (1997).

⁶³ See *id.*; Scherer, *supra* note 19, at 222. Scherer notes that to select a mediator, parties will consider the mediator's mediation training and experience, knowledge of tax law and industry practice, expenses and fees, and any official, financial, or personal conflict of interests that may exist. See *id.* at 222-23.

⁶⁴ See *Extension of Test of Mediation Procedure for Appeals*, *supra* note 32, at 34.

The Appeals Office is reintegrated into the mediation process at the end. After the agreement to mediate is completed, each party submits "discussion summaries" to the mediator that identify each party's interests and discussions of any available alternatives.⁶⁵ If an agreement is reached in the mediation, the Appeals Office will use its established procedures to finalize the agreement by preparation of a "specific matters closing agreement."⁶⁶ However, the mediation decisions are nonbinding, and either party may withdraw from the mediation at anytime with written notification.⁶⁷ Ideally, the entire mediation process is expected to last for two months, and the actual mediation sessions should conclude within one or two days.⁶⁸ If no agreement is reached, the Appeals Office will not reconsider the issue and a statutory notice of deficiency then is issued.⁶⁹

C. Success of Mediation Tests

Up to this point, the use of mediation has been called "an unmitigated success."⁷⁰ In particular, valuation cases have been found to be well suited for mediation.⁷¹ Also, commentators have recommended that taxpayers always request mediation if a taxpayer finds an auditor to be unreasonable or if there is a personality clash.⁷² Such various uses of mediation imply that mediation is a handy tool in resolving taxpayer disputes of almost any color.

The use of mediation by taxpayers is expanding with each new pilot mediation program that the IRS implements. In the first one-year test, there were nine requests for mediation. Of these requests, only four were approved for mediation and two were mediated successfully.⁷³ The IRS denied mediation for

⁶⁵ Louthan & Wrappe, *supra* note 20, ¶ 44.

⁶⁶ *Extension of Test of Mediation Procedure for Appeals*, *supra* note 32, at 36.

⁶⁷ See Knight & Knight, *supra* note 62, at 48.

⁶⁸ See Louthan & Wrappe, *supra* note 20, at ¶¶ 44–45. Commentators have noted that "[e]xperience indicates that settlement is more likely if there is only one mediation session limited to one day." *IRS Willing to Try Mediation in Docketed Tax Court Cases*, 84 J. TAX'N 186, 186 (1996).

⁶⁹ See *Extension of Test of Mediation Procedure for Appeals*, *supra* note 32, at 34.

⁷⁰ *IRS Restructuring*, *supra* note 1, at 321 (statement of Michael E. Mares, Chair, Tax Executive Comm., AICPA).

⁷¹ See *id.*

⁷² See Randolph H. Clark et al., *Solutions/The Problem: Surviving an Audit When the IRS Comes Knocking on Your Door—A Few Pros Provide Their Quick Tips on What to Do When the IRS Audits You*, *NEWSDAY*, Mar. 8, 1999, at 7, 7.

⁷³ On September 21, 1995, the IRS settled its first case under its mediation program. The case involved a tax dispute with E.I. DuPont de Nemours regarding how to allocate the

certain cases because they failed to meet the criteria for approval.⁷⁴ The second test period resulted in seventeen requests for mediation. Of these requests, nine requests were not approved because they did not meet the requirements for mediation, and six requests were resolved successfully.⁷⁵ The National Appeals Office reported that from July 1998 and the initiation of its most recent mediation test to June 1999, its office already has received thirty-one requests.⁷⁶ Such statistics indicate the demand and potential success of the use of mediation by the IRS.

Although the application of mediation by the IRS is growing, there are areas that could be examined to increase the program's potential. For example, one member of Congress argued for greater use of mediation by the IRS; Representative Jackson-Lee argued, "[t]here is some form like [mediation], but it is not where it is moved in a direction that reinforces the taxpayer that this is the right thing to do, to sit down in mediation."⁷⁷ As enumerated below, other agencies have used mediation as a tool to settle disputes ranging from taxes to employee grievances successfully. The IRS could review these programs in further evaluating its own program.

IV. AREAS TO BE EXAMINED IN THE IRS MEDIATION PROGRAM

Although one must applaud the IRS for implementing mediation procedures for taxpayer disputes, there are areas in the program that can be examined to increase the effectiveness of the program. The following discussion describes such areas in the IRS mediation program. In addition, this Part suggests that the IRS should examine strategies implemented by other agencies that have succeeded in providing effective mediation programs to their customers and patrons. For example, several states have implemented and codified the use of mediation as an alternative method for resolving their own tax disputes.⁷⁸ The

purchase price of a manufacturing facility. DuPont requested the mediation session. The IRS viewed the case as appropriate for mediation because it involved "a lot of money" and a factual issue. The case was mediated with a former United States Tax Court judge serving as a mediator, and it settled after one day. *See DuPont Mediates Case Through IRS Program*, 14 ALTERNATIVES TO HIGH COSTS LITIG. 47, 47 (1996).

⁷⁴ *See Scherer, supra* note 19, at 227.

⁷⁵ Telephone Interview with IRS Official, National Office of Appeals (Nov. 24, 1998).

⁷⁶ *See id.* Of the total requests received, seven requests have been resolved favorably and nine requests did not qualify for mediation. Twelve requests were still in process at the time of the interview. *See id.*

⁷⁷ 143 CONG. REC. H8988 (daily ed. Oct. 22, 1997) (statement of Rep. Jackson-Lee).

⁷⁸ *See, e.g.,* ALASKA STAT. § 43.05.240 (Michie 1998); D.C. TAX R. 10; FLA. STAT. ch. 72.011 (1998).

THE INTERNAL REVENUE SERVICE'S MEDIATION PROGRAM

IRS could review such frameworks for the development of mediation in the area of tax.

A. *Limited Scope of Availability*

The largest obstacle to a more expansive use of mediation is the limited scope of availability of mediation to taxpayers. For example, mediation is presently not available for cases involving an adjustment of less than one million dollars.⁷⁹ These restrictions also include that the case must involve factual issues such as valuation, reasonable compensation, or transfer pricing.⁸⁰ In addition, mediation is restricted further because it may be requested by a party only after negotiations with the Appeals Office have failed to reach a settlement.⁸¹ Mediation is more successful when it is used as more than a piecemeal device; one commentator argues for an institutionalization of mediation, in which mediation is considered in every dispute.⁸² As explained below, some federal and state agencies have followed this idea, which has resulted in success.

Although hesitant to apply a full-blown mediation program to all taxpayer disputes,⁸³ the IRS could examine the success of other agencies that have allowed mediation to be used in all cases. For example, New York's Bureau of Conciliation and Mediation Services (BCMS) provides access to every taxpayer regardless of the issue, the complexity of the issue, or the dollar amount in controversy.⁸⁴ Similar to the mediator for an IRS taxpayer dispute, the goal of the

⁷⁹ See *Extension of Test of Mediation Procedure for Appeals*, *supra* note 32, at 34. A "Notice to Expand Mediation" is expected to be published by the IRS during the year 2000. The author suspects that the one million dollar threshold may be eliminated in this Notice. Telephone Interview with IRS Official, *supra* note 75. The author apologizes for any inconsistencies with this Note that may result from the potential publication of this IRS Notice.

⁸⁰ See Telephone Interview with IRS Official, *supra* note 75.

⁸¹ See Scherer, *supra* note 19, at 219.

⁸² See Feinberg, *supra* note 46, at S21-S22.

⁸³ Thomas C. Louthan, Director of the Office of International, TEFRA, and Dispute Resolution Programs in the National Office of Appeals of the IRS, once stated, "we must make certain that the role of our Appeals officers is not compromised by the perception that mediation is offered as a primary alternative means of dispute resolution, but is only relatively rarely used in certain intractable cases." *IRS Appeals International: Dispute Resolution, Competent Authority, and APAs*, 5 J. INT'L TAX'N 419, 421 (1994).

⁸⁴ In response to a restructuring of the state's appeals process, BCMS began operations on September 1, 1987 as a place "intended to provide taxpayers with a rapid, inexpensive and informal means for resolving disputed tax assessments." 1997-1998 N.Y. BUREAU OF CONCILIATION & MEDIATION SERVS. ANN. REP. 1; see also N.Y. COMP. CODES R. & REGS. tit. 20, § 535.5(a)(2)(i)(a) (1998). BCMS is an independent bureau within the Tax

BCMS conferee is, "where possible, in whole or in part, to resolve the controversy between the parties within the framework of the Tax Law, thereby narrowing the scope of or eliminating the need for a hearing in the Division of Tax Appeals."⁸⁵ But, unlike the application of the IRS mediation test, New York's tax statute provides every taxpayer access to BCMS's services.⁸⁶ In fact, BCMS strongly recommends that all taxpayers pursue mediations in lieu of, or prior to, filing a petition with the Division of Tax Appeals.⁸⁷

The New York State Tax Department has enjoyed the benefits of the BCMS operations. BCMS consistently closes more than ninety percent of the cases before it each year. In addition, over one-third of its cases are resolved within six months from the filing of the case.⁸⁸ As a result, the percentage of cases petitioned to New York's Division of Tax Appeals has decreased.⁸⁹ Differences do exist between the IRS and the BCMS with regard to the implementations of mediation to taxpayer disputes, such as who is allowed to participate and whether or not the orders are binding. The IRS may want to examine the success of the BCMS in considering how to expand its mediation services to taxpayers. As

Department's Division of Taxation and, similar to the IRS Appeals Office, is concerned only with the resolution of taxpayer disputes. *See* 1997-1998 N.Y. BUREAU OF CONCILIATION & MEDIATION SERVS. ANN. REP. 1.

⁸⁵ N.Y. COMP. CODES R. & REGS. tit. 20, § 4000.5(c)(1)(i) (1998).

⁸⁶ *See* N.Y. TAX LAW § 170.3-a(a) (McKinney 1998). The use of BCMS is

at the option of any taxpayer . . . where such person has received any written notice of a determination of tax due, a tax deficiency, a denial of a refund or credit application, a cancellation, revocation or suspension of a license, permit or registration, a denial of an application for a license, permit or registration or any other notice which gives rise to a right to a hearing under this chapter if the time to petition for such a hearing has not elapsed.

Id.

⁸⁷ *See* 1997-1998 N.Y. BUREAU OF CONCILIATION & MEDIATION SERVS. ANN. REP. 2.

⁸⁸ *See id.* at 7. For the 1997-1998 fiscal year, BCMS closed 45% of its cases within six months, 80% of the cases within 12 months, 93% of the cases within 18 months, and 96% of the cases within 24 months. *See id.* At the conclusion of the mediation, if the requester of the mediation agrees with the proposed resolution, called a "consent," the requester has 15 days to execute the consent, thereby waiving one's right to petition for a hearing with the Division of Tax Appeals. *See* N.Y. COMP. CODES R. & REGS. tit. 20, § 4000.5(c)(3)(ii) (1998). If the requester does not agree with the consent, the proceeding concludes and a "conciliation order" is issued within 30 days after the conclusion of the mediation. *See id.* § 4000.5(c)(3)(iii). This order is binding on the requester, unlike the mediation agreement reached in an IRS tax dispute, unless the requester petitions for a hearing within 90 days after the order is issued. *See id.* § 4000.5(c)(4).

⁸⁹ *See* 1997-1998 N.Y. BUREAU OF CONCILIATION & MEDIATION SERVS. ANN. REP. 3.

THE INTERNAL REVENUE SERVICE'S MEDIATION PROGRAM

shown by its statistics, BCMS is effective as an alternative to litigation of tax disputes.⁹⁰

In addition, even federal agencies such as the Department of Justice's (DOJ's) Tax Division mandate that mediation be considered in all civil cases.⁹¹ In fact, the DOJ considers an attorney's use of ADR in making settlements when making promotions and giving employee awards.⁹² The IRS can learn from the DOJ's experience with mediation integration. Both agencies can benefit from the use of mediation because settlements will be made more easily by "going beyond the legal issues in controversy" and broadening resolution alternatives.⁹³ However, the DOJ's insistence that a method of ADR be considered in all cases in the Tax Division and the DOJ's broader requirements for the use of mediation allow mediation to be used in more cases and, therefore, to be more effective. The IRS may want to examine the DOJ's success rate using mediation in order to determine whether to expand its application of mediation.

Similar to the IRS, other federal agencies such as the Securities and Exchange Commission (SEC) are considering whether to allow mediation access for all consenting patrons. The New York Stock Exchange recently has filed a request for a proposed rule change which will require, on a two-year pilot basis, the use of mediation if the amount of the claim is more than \$500,000.⁹⁴ In addition, unlike the limited scope of cases that can use mediation in IRS tax disputes, mediation will be provided for all other cases as long as the parties

⁹⁰ Of note, statistics do not reveal any bias in the resolution of cases. For instance, the taxpayers and the Department of Taxation have been equally successful in prevailing in the conciliation conferences even though most cases conclude with the requesters agreeing to the consents. *See* 1997-1998 N.Y. BUREAU OF CONCILIATION & MEDIATION SERVS. ANN. REP. 5.

⁹¹ However, the Tax Division only recommends using mediation after a case has been developed more fully. *See* Policy on the Use of Alternative Dispute Resolution, and Case Identification Criteria for Alternative Dispute Resolution, 61 Fed. Reg. 36,895, 36,913 (1996) (proposed July 15, 1996).

⁹² *See id.* at 36,912. The DOJ is the "biggest user of the federal courts and the nation's most prolific litigator." *Id.* at 36,895. On April 6, 1995, Attorney General Janet Reno issued an Order directing greater use of ADR by the DOJ that required each civil litigating division to issue an ADR policy statement, case selection criteria for ADR, training requirements for ADR, authorization and funding of ADR, and a reporting system for each division's use of ADR. *See id.* at 36,899, 36,905. Throughout the Order, the DOJ cites mediation as the preferred method in certain circumstances. *See, e.g., id.* at 36,901, 36,904.

⁹³ *Id.* at 36,907.

⁹⁴ *See* Self-Regulatory Organization; Notice of Filing of Proposed Rule Change by the New York Stock Exchange, Inc. Relating to Arbitration Rules, 63 Fed. Reg. 55,170, 55,170 (1998) (proposed Oct. 14, 1998).

consent and share mediation expenses.⁹⁵ The parties asserted that such use of mediation will result in "significant cost savings."⁹⁶ Similarly, if the IRS decides to expand its application of mediation to all taxpayers, the use may result in cost savings to the agency and a decrease in litigation.

A sign of expansion is shown in the IRS's future mediation program plans. Under the IRS Restructuring and Reform Act of 1998, the IRS must establish procedures that allow the taxpayer or the Appeals Office to request nonbinding mediation on any issue if negotiations with the Appeals Office have failed.⁹⁷ Under the Act, mediation would be expanded to taxpayer disputes below the one million dollar threshold; however, the taxpayer still must go through established appeals procedures before mediation may be requested.⁹⁸ It appears that mediation is viewed by Congress and the IRS as "an effort of last resort" to be used if its established procedures are unsuccessful.⁹⁹ By examining the success rates of other agencies' that use mediation initially, the IRS may find that mediation can be just as successful, if not more, than the appeals procedures.

B. "One-Shot" Deal

Another limitation of the IRS mediation program is that the use of mediation by a taxpayer is a "one-shot deal."¹⁰⁰ A taxpayer is allowed to use the mediation process only once. Apparently, the IRS is concerned that taxpayers will abuse the process by using it repeatedly.¹⁰¹ In fact, the IRS stated that "[e]xcept in extraordinary circumstances, mediation is not to be offered to the taxpayer more than once or tried again after being unsuccessful."¹⁰² The obvious problem with

⁹⁵ See *id.* Comments were due on the proposed rule change on November 4, 1998. See *id.* at 55,171.

⁹⁶ *Id.* at 55,171.

⁹⁷ See IRS Restructuring and Reform Act of 1998 § 3465, 26 U.S.C.A. § 7123(b) (West Supp. 1999). The relevant portion of the Act provides as follows: "The Secretary shall prescribe procedures under which a taxpayer or the Internal Revenue Service Office of Appeals may request non-binding mediation on any issue unresolved at the conclusion of (A) appeals procedures; or (B) unsuccessful attempts to enter into a closing agreement under § 7121 or a compromise under § 7122." *Id.* Comments were due to the IRS on this provision on February 14, 1999. See *IRS Expands Mediation Program*, 98 TAX NOTES TODAY 211-13, Nov. 2, 1998, available in WESTLAW, 98 TNT 211-13.

⁹⁸ See 26 U.S.C.A. § 7123(b).

⁹⁹ Kaplan, *supra* note 39, at 1050.

¹⁰⁰ *IRS Willing to Try Mediation in Docketed Tax Court Cases*, *supra* note 68, at 186.

¹⁰¹ See *id.*

¹⁰² *Id.* (quoting Memorandum from the Chief Counsel's Office, IRS, to the Field Administrative Officers, IRS (Oct. 13, 1995)).

the "one-shot deal" is that the IRS limits the persons who can use mediation and discourages those who have used mediation successfully from using the process again. As a result, these taxpayers have no recourse but to pursue their disputes through litigation, thereby increasing the courts' dockets and increasing the costs to the IRS.

A solution may be to open mediation to all taxpayers, whether they have used mediation before or not. As explained in the previous subpart, New York's BCMS has had considerable success with mediation by opening it up to all taxpayers; in addition, another federal agency, the DOJ, requires that mediation be considered in civil tax matters. The IRS should examine whether such application would be beneficial to the IRS in terms of the time and cost savings, the primary benefits of using mediation.¹⁰³

C. Voluntary Participation

Another area for the IRS to review in its mediation pilot program is the voluntary nature of the program, being completely optional to the taxpayer.¹⁰⁴ By being completely voluntary to the taxpayer, a taxpayer may choose not to resolve his case through mediation because, similar to the IRS itself, the taxpayer may feel more comfortable with the traditional appeals process.¹⁰⁵ By not using mediation, the IRS's costs increase, and the resolution of cases may be prolonged if litigation is pursued.¹⁰⁶

The IRS could review programs that mandate mediation in its procedures; such programs may prove feasible to be used by the IRS. For example, Congress allows the National Mediation Board to require mandatory mediation attendance for labor disputes. The National Mediation Board is governed by the Railway Labor Act,¹⁰⁷ enacted in 1926. The Railway Labor Act's purpose is "to facilitate voluntary settlements in disputes over proposed changes in rates of pay, rules, or working conditions."¹⁰⁸ Within the Railway Labor Act, Congress codified the

¹⁰³ See KOVACH, *supra* note 3, at 40.

¹⁰⁴ See Lawson, *supra* note 29, at 18.

¹⁰⁵ See GEN. ACCOUNTING OFFICE, *supra* note 13, at 9.

¹⁰⁶ See McDonough, *supra* note 5, at 41.

¹⁰⁷ See 45 U.S.C. §§ 151-162 (1994 & Supp. III 1997).

¹⁰⁸ Eric H. J. Stahlhut, *Mission Impossible: The Hollow Promise of Judicial Review of Mediation Under the Railway Labor Act*, 18 U. DAYTON L. REV. 703, 703-04 (1993) (citing *Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 378-86 (1969)); see also 45 U.S.C. § 151a. The de facto purpose of the Act is to prevent transportation shut-downs and promote "industrial peace" by ensuring that the Mediation Board does not overlook the needs of labor. Stahlhut, *supra*, at 705, 726.

use of mediation as the primary method to settle labor disputes.¹⁰⁹ The Mediation Board contacts the disputing parties “promptly” and “shall use its best efforts, by mediation, to bring them to agreement.”¹¹⁰

Unlike the voluntary nature of IRS mediation, the Mediation Board imposes “mandatory mediation.”¹¹¹ This mediation process is considered mandatory because the mediation must occur within thirty days of the notice of desire to open an agreement. Even though the mediation is mandatory, there is no order to settle agreement; the only compulsion is to attend the mediation session(s). As a result, no party may withdraw from the mediation; the mediation will continue until a settlement is reached or the mediator concludes that a settlement is unlikely.¹¹² The power given to the Mediation Board by Congress aids its purpose of settling labor disputes without the use of litigation. Given that this use of mediation was used even before the IRS Office of Appeals began to implement ADR techniques, the IRS may want to examine this long-standing practice, take note of the longevity of the use of mediation in these circumstances, and borrow the procedure.¹¹³

Also, the Georgia Office of Dispute Resolution allows mediation to be mandated under certain circumstances. The use of mediation is arranged on a case-by-case basis by the judge, and the judge may refer any civil, criminal, or juvenile case to mediation. In fact, unlike the voluntary nature of the IRS mediation program, the parties may be ordered to attend mandatory mediation sessions; however, settlement is not required.¹¹⁴ With regard to resolving tax disputes, the Georgia Revenue and Taxation title of its code does provide for the use of mediation.¹¹⁵ In some cases, parties have been required statutorily to use mediation to settle a tax dispute.¹¹⁶

¹⁰⁹ Stahlhut, *supra* note 108, at 703 n.1.

¹¹⁰ 45 U.S.C. § 155(b).

¹¹¹ See Stahlhut, *supra* note 108, at 703 n.1.

¹¹² See *id.* Stahlhut commented that the courts have been unwilling to rule over the mediators' decisions in these cases. See *id.* at 705.

¹¹³ The Mediation Board closes over one-third of the cases that it mediates. This amount is considered successful because of the complexity of issues involved in each case. See Newman, *supra* note 49, at 141.

¹¹⁴ See GA. CT. R.P. app. A (ADR), at 2.1, 2.6.

¹¹⁵ See GA. CODE ANN. § 48-8-89(d)(3) (1995). The Georgia Code states, “if parties fail to reach an agreement within 60 days, such parties shall agree to submit the dispute to nonbinding arbitration, mediation, or such other means of resolving conflicts in a manner which, in the judgment of the commissioner, reflects a good faith effort to resolve the dispute.” *Id.*

¹¹⁶ See, e.g., Jackson v. City of College Park, 496 S.E.2d 777, 780 (Ga. Ct. App. 1998) (involving a dispute between county municipalities and the Georgia Department of Revenue regarding the distribution of revenues from sales and use taxes imposed by the counties).

THE INTERNAL REVENUE SERVICE'S MEDIATION PROGRAM

Although the mediation process is typically voluntary, the IRS may want to examine whether mandatory mediation attendance would improve its process because of the effectiveness of other similar applications.

D. *Choice of Mediator*

The IRS also may want to examine its process for the selection of the mediator. For example, as explained above, mediators may be selected from either the Appeals Office or another source. The use of non-IRS mediators may slow down the mediation process because the mediators are not familiar with tax issues and the tax law.¹¹⁷ The IRS can look at other agencies' selection procedures to improve the selection process.

For example, the IRS can review the use of mediation by federal agencies in resolving Equal Employment Opportunity complaints and how the mediators are selected only from agency personnel. These personnel are chosen because they are more familiar with the specific area of law than other mediators, who may be experienced in the process of mediation but not specialized in that particular area.¹¹⁸ The mediators who are chosen better understand the dispute and help the mediation process operate smoothly by being more familiar with the underlying subject matter. Although a question is raised that the mediator may be more biased toward the agency and try to influence the mediation in the agency's favor, experience and success with mediation in other agencies prove that this situation is unlikely.¹¹⁹

The IRS also can examine state agencies such as the Office of Dispute Resolution in Georgia with regard to selection of mediators. What distinguishes this Office of Dispute Resolution's mediation program from other state agencies is that Georgia has very strict requirements for its mediators compared to other governmental entities or agencies. For example, the mediators must have "process expertise," at least twenty hours of classroom training, at least five observations or comediations with an experienced mediator, and, in certain cases, the mediator must have at least a Bachelor's degree from an accredited four-year college. In addition, if mediated issues are outside the mediator's area of expertise, the mediator must obtain more extensive training from the basic mediation process. In fact, in order to register with the Georgia Office of Dispute

¹¹⁷ The selection of the mediator is important because tax statutes are known for their complexity. See *IRS Restructuring*, *supra* note 1, at 312.

¹¹⁸ See DANIEL R. LEVINSON ET AL., *USING ALTERNATIVE DISPUTE RESOLUTION IN THE FEDERAL GOVERNMENT* 12-13 (1993).

¹¹⁹ New York's BCMS already has resolved that the use of such personnel as mediators will not bias the mediation toward the agency. The use of specially trained mediators can only facilitate the process even further. See discussion *supra* note 90.

Resolution, the mediator must also provide one letter of recommendation from a court program or three letters of recommendation from clients who can comment on the mediator's performance.¹²⁰ Unlike Georgia, the IRS has not established strict guidelines for the selection of mediators, only that the mediator be mutually agreed upon by the parties.¹²¹

Overall, the mediator is an essential element of the mediation process because it is the mediator who ensures that the process runs smoothly, thus increasing the likelihood that the mediation will be effective.¹²² The IRS could examine mediator selection procedures, such as those by the Georgia Office of Dispute Resolution and other federal agencies, to increase the effectiveness of its own mediation process.¹²³

E. Other Potential Areas for Review

One commentator, Kirsten J. McDonough, suggested other weaknesses presented by the use of mediation in tax. For example, McDonough suggested that although mediation should consider the needs and interests of both parties, tax disputes are concerned only about the amount to be paid. As a result, there are few available solutions to a dispute, despite the parties' needs.¹²⁴ McDonough also suggested that although mediation is appropriate in cases when a personal relationship exists and will continue to exist, no personal relationships exist in tax disputes, and the taxpayer hopes that there will be no future relationships, such as no more audits.¹²⁵ Finally, McDonough suggested that the mediation process is unfair to the taxpayer because the government has more money and more access to legal resources.¹²⁶ In order to tackle such concerns, the IRS could examine critically the state tax agencies' use of mediation to determine whether mediation is the appropriate method to resolve tax disputes. In weighing its research, the IRS also should note that the use of mediation in tax

¹²⁰ See GA. CT. R.P. app. B (ADR), at II(B).

¹²¹ See Knight & Knight, *supra* note 62, at 49.

¹²² See KOVACH, *supra* note 3, at 28–29. One commentator stated that a mediator must understand a case well for mediation to be successful. See Collette C. Goodman, *Are There Better Ways to Resolve Tax Disputes?*, FED. B. ASS'N SEC. TAX'N REP., Winter 1993, at 1, 4.

¹²³ The National Mediation Board, as discussed above, see *supra* Part IV.C, also requires subject-matter expertise in the selected mediators. All of the Mediation Board's mediators must have airline or railroad experience in bargaining. See Newman, *supra* note 49, at 140.

¹²⁴ See McDonough, *supra* note 5, at 41.

¹²⁵ See *id.*

¹²⁶ See *id.*

THE INTERNAL REVENUE SERVICE'S MEDIATION PROGRAM

disputes does have the advantages of being faster, cheaper, and informal, in addition to giving the parties control of the confidentiality of the process.¹²⁷

V. CONCLUSION

The IRS has made great strides in improving its resolution of taxpayer disputes by introducing mediation to its appeals process. In fact, other countries are even following the IRS's lead in trying mediation.¹²⁸ It is hoped that mediation will provide the IRS with significant time and cost savings, including a decrease in the court's docket of tax disputes accompanying the decrease in potential litigation. However, in order to provide a meaningful example of the use of mediation in tax disputes, the IRS should examine its present applications of mediation. Several agencies, including agencies not discussed, effectively use mediation to resolve disputes, the process and procedures of which differ from that of the IRS. By examining and possibly borrowing these procedures, the IRS could see a great improvement and increased effectiveness in the use of mediation to resolve taxpayer disputes.

New IRS National Taxpayer Advocate, W. Val Oveson, commented that

Alternative dispute resolution of tax cases has not developed nearly as fast as in other areas of the law, and there are several of us out here trying to change that. . . . I think it's a natural. I think there are a lot of potential applications of mediation and arbitration techniques in resolution of taxpayer claims.¹²⁹

The IRS should follow the advice of Mr. Oveson; mediation can provide great benefits if appropriately used. Mediation can result in significant cost and time savings to the IRS. Such benefits would please the taxpayers and IRS alike.

¹²⁷ See *id.*

¹²⁸ See Brian J. Arnold, *Improved Cooperation Between Revenue Canada and Department of Finance Recommended*, 17 TAX NOTES INT'L 12, 12-13 (1998); Austl. Taxation Office, *Australia's Commissioner of Taxation Makes Speech on New Tax Administration*, 17 TAX NOTES INT'L 1783, 1783 (1998) (stating that the Australian Taxation Office will be examining the use of mediation). Revenue Canada, which administers and enforces Canada's tax laws, currently is considering a mediation pilot project. Similar to the IRS, Revenue Canada will be proceeding slowly with this initiative in order to avoid upsetting its efficient appeals process. See *id.*

¹²⁹ Amy Hamilton, *Rossotti Names New Taxpayer Advocate, Two Deputy Commissioners*, 98 TAX NOTES TODAY 155-1, Aug. 12, 1998, available in WESTLAW, 98 TNT 155-1 (quoting statement of Mr. Oveson). Of note, Mr. Oveson, prior to his appointment as Taxpayer Advocate, created the mediation system in Utah for taxpayer disputes. See *New Team Tackles the IRS—Management Plans to Revamp the Criticized Organization*, NEWSDAY, Aug. 12, 1998, at A48.

